Supreme Court U.S.
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NO. 01-1794

IN THE
Supreme Court of the United States

JOSE MELENDREZ, JR., ***Petitioner***

V.

FRANCIS E. SEIB, Drug Enforcement Administration, Head DEA Agent in Charge of Eagle Pass, Texas, in His Official Capacity; **MOSES PENA,** Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in His Official Capacity; **LARRY LEON,** Drug Enforcement Administration, Former DEA Agent in Eagle Pass, Texas, Not in San Antonio, Texas, in His Official Capacity; **TONY QUINTANILLA,** Former County Investigator of Zapata County, Now a U.S. Border Patrol Agent in Fort Hancock, Texas, in His Official Capacity; **ARNOLDO RAMOS,** Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in His Official Capacity; **UNITED STATES OF AMERICA,** ***Respondents.***

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT, TONY QUINTANILLA'S, BRIEF IN OPPOSITION

Phillip A. McKinney, State Bar No. 13723200
McKINNEY & RODRIGUEZ-BARRERA, P.C.

Attorney and Counsel of Record for Respondent,
Tony Quintanilla

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QUESTIONS PRESENTED

1. Can Petitioner maintain a late-filed cause of action where there is no evidence that any defendant mislead him as to his filing deadline and thus no evidence to trigger a tolling provision?

2. Did the courts below properly interpret the legal basis for the Petitioner's alleged causes of action?

3. Can Petitioner maintain a cause of action against Respondent Quintanilla for claims involving wrongful conviction and incarceration without first showing that the conviction and sentence have been reversed, expunged, declared invalid, or otherwise called into question by court issuance of a writ of habeas corpus?

4. Can Petitioner complain that a trial judge should have recused himself without filing a proper motion to that effect?

5. Can Petitioner complain about the denial of a motion to supplement the record without first showing that the proposed supplemental material is not already filed in the record and would have a material effect on the outcome of the case?

CORPORATE DISCLOSURE STATEMENT

Respondent, Tony Quintanilla does not dispute the list of parties provided by the Petitioner, but offers this Corporate Disclosure Statement for his insurer, St. Paul Fire & Marine Insurance Co. ("SPFM"). SPFM is a wholly owned subsidiary of The St. Paul Companies.

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RESPONDENT, TONY QUINTANILLA'S, BRIEF IN OPPOSITION

Respondent, Tony Quintanilla, files this Brief in Opposition praying that this Court deny the Petition for Writ of Certiorari complaining of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case February 20, 2002.

REASONS FOR DENYING THE WRIT

Petitioner's case was dismissed for procedural reasons and because, on its face, it failed to state a proper claim. Petitioner has failed to demonstrate to this Court that the judgment was legally or factually wrong on the issues decided. Rather, at this stage, Petitioner seeks to bypass these dispositive issues and try the case on the merits of his allegations. Thus the Petition for Writ of Certiorari is misdirected and fails to sustain any appellate burden of proof.

A. The Claim is Barred by Limitations

Before a claim can be filed in the federal courts, where it alleges a cause of action against the United States, the claimant must exhaust administrative remedies. *Brown v.*

NationsBank Corp., 188 F.3d 579, 589-90 (5th Cir. 1999). To do so, the claimant must present the claim in writing to the appropriate agency within two years after the accrual of the claim. 28 U.S.C. § 2401(b). The claimant may then file suit within six (6) months after the administrative claim is denied. *Id.*

Petitioner's claim is based upon an alleged wrongful conviction. He pled guilty to a crime and was sentenced to incarceration no later than June 10, 1996. *See generally, Brown, supra* at 589-90 (discussing criteria for "accrual" of a cause of action). Therefore, he had until June 10, 1998 to present his written claim to the appropriate federal agency. This he failed to do.

Despite his representations in paragraph 1 of his Statement of the Case, Petitioner did not present a proper written complaint to any agency until June 20, 2000, more than two years after limitations expired.

Consequently, Petitioner claims that he is entitled to equitable tolling under *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). While equitable tolling is available in instances where the claimant files a defective pleading or is induced or tricked by his adversary into allowing the filing deadline to pass, Petitioner has not shown himself to fall within that rule.

First, all of the Petitioner's allegations of trickery go to the issue of his initial conviction. Thus the representations made in the Petitioner's Statement of Facts paragraphs 1 through 21, while certainly subject to dispute, are irrelevant to the issues to be decided by this Court.

Second, there is no evidence that Petitioner tried to make a legal claim within the two-year limitations period. Without any such evidence, Petitioner could not defeat summary judgment in favor of the United States on limitations.

B. The Courts Below Properly Construed Petitioner's Allegations.

Petitioner, in less than precise language, sued Respondents for violation of his due process rights. The Respondents include local and federal law enforcement agents, specifically sued in their respective official capacities. It is undisputed that Tony Quintanilla, at all relevant times, was not a federal employee, but a local law enforcement agent. Therefore, the Federal Tort Claims Act, which addresses the liability of the federal government and its employees, does not provide Petitioner with a theory of liability against Quintanilla. 28 U.S.Ç. § 2671.

Rather, the only liability theory available to Petitioner arose through 42 U.S.C. § 1983. In this Court and in the courts below, Petitioner has repeatedly argued that he did not sue Quintanilla under § 1983. Therefore, he should be deemed to have waived any such claim. In such case, he no longer has any cause of action against Quintanilla.

Even if he were to try to construct such a claim at this time, it would fail under the *Heck* rule as briefed herein.

C. Petitioner Has No Tort Claim So Long As Conviction Stands.

Petitioners claims are all necessarily related to his conviction and sentence of incarceration. That is his only claimed injury. It is well-settled that one cannot make a claim based on an alleged wrongful conviction unless he can show that the conviction was reversed on appeal, expunged, declared invalid or otherwise called into question by issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477 (1994).

Petitioner argues that the *Heck* rule is limited to causes of action based upon a malicious prosecution theory because innocence of the crime is an element of malicious prosecution, but is not an element of an abuse of process theory. But the rationale for *Heck* is that the conviction "constitutes a final

judgment on the matter which bars th[e] civil suit." *Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995).

Where Petitioner voluntarily pled guilty to the crime and has not demonstrated any legal effort to reverse or invalidate that guilty plea and conviction, let alone success in that effort, he is precluded from a collateral attack on that conviction by seeking tort damages in a civil proceeding that necessarily implies the invalidity of the conviction. *Heck*, *supra*.

D. No Entitlement to Recusal Absent Proper Motion.

If a party believes that a judge has a personal bias or prejudice that compromises his ability to preside over the case, that party must file a timely motion seeking recusal and a notice of appeal regarding any denial of the motion in order to preserve error. *See generally*, Fed. R. Civ. P. 7(b)(1); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 744 (5th Cir. 1993). Petitioner did not file such a motion, did not obtain a ruling, and did not file a notice of appeal preserving a complaint. Therefore, he is not entitled to the relief now requested on appeal. *See generally*, Fed. R. App. P. 3(c)(1)(B).

Petitioner argues that he "addressed the issue" and that references to it appear in other court documents. However, without a motion, ruling, and notice of appeal, discussions and oblique references are of no legal consequence.

E. There Was No Need to Supplement the Record.

The Fifth Circuit denied the Motion to Supplement the Record, reciting that the material sought to be added was already in the record. Petitioner has not demonstrated the factual inaccuracy of the Fifth Circuit's recital.

While he attaches a letter indicating that the trial court clerk and the appellate court clerk communicated and determined that there were no "exhibits" for the record, he has not demonstrated that the materials were not in the record as something other than what the trial court clerk would term "exhibits."

Furthermore, Petitioner has failed to demonstrate any harmful error in the unlikely event that his complaint is something more than a mere failure to communicate or semantic confusion. He has not shown that anything in the materials he sought to supplement would cause the court to arrive at a different ruling on the motion for summary judgment

or motions to dismiss. Thus he has not shown himself entitled to any relief from this Court.

PRAYER

For the reasons stated, certiorari should be denied and Respondent, Tony Quintanilla so requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Respondent's, Tony Quintanilla's, Brief in Opposition was served on all counsel of record by placing three copies of same in the United States Mail, first class, postage prepaid, on the date indicated below, addressed as follows:

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